JD–19-05
Washington, DC

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

THE GEORGE WASHINGTON UNIVERSITY
Employer

and Case 5-RC-15715

SERVICE EMPLOYEES INTERNATIONAL
UNION, LOCAL 500, AFL-CIO
Petitioner

REPORT ON CHALLENGES

I. Background

WILLIAM G. KOCOL, Administrative Law Judge. This matter was heard by me in Washington, D.C. on January 10-13, 2005. The University and the Petitioner thereafter filed briefs that I have considered.

Pursuant to a stipulated election agreement approved by the Regional Director on May 3, 2004, a secret-ballot election was conducted by mail in the following unit:

> All regular part-time faculty who receive pro-rated benefits and part-time faculty compensated per course without benefits, employed by the Employer, teaching at least one-credit earning class or lesson or lab, but excluding all other employees; all full-time faculty; all employees of the School of Medicine & Health Sciences; all pre-clinical and clinical medicine instructional faculty; all librarians; all employees based in facilities of the Employer more than 30 miles from the main campus; all employees at the Hampton Roads facility; all lab assistants, graduate assistants, clinical fellows, teaching fellows, teaching assistants and research assistants who are not part-time faculty; all employees who teach only zero credit laboratory, discussion, or recitation sections; all administrators, registrars, managers and guards and supervisors as defined in the Act.

The voters who were eligible to vote in the election were part-time faculty (as defined in the unit description) who were employed as such during at least two of the following four semesters: spring 2003, fall 2003, spring 2004, and fall 2004. For part-time faculty who were employed during the fall 2004 semester, these employees had to have received their appointment no later than September 15, 2004.

The tally of ballots, conducted on October 22, 2004, shows that the Petitioner was ahead 328 to 316, but 50 votes were challenged. At the hearing, the parties stipulated to resolve many of those challenges. The parties agreed that the challenges to the following ballots should be sustained and the votes not counted: Patricia Wrightson, Hollie Weisman, Alice M. Stevens, Christina Sevilla, Abby Weiner, Cheryl Focht, Kelly Mulligan, Allison Purpura, Morris Parker, Linda Raphael, Christina Hanson, Bernard Cabral, Sandra Alboum, Warren Allen, Michael Everitt, William Jackson, Renee Spriggs, Peter Sage,[1] Megan Davis, Dorothy Holmes, Adele Ashkar, Kimberly Digges, David Michaels, and Nina Michalevsky.

The parties further agreed that the challenges to the following ballots should be overruled and their ballots counted: Deborah Sobeloff, Carol Rochester, Elaine Murphy, Gwen Roberts, Brian Flota, Sara Davis, Sharon Confesiore, John Boswell,[2] Pamela Jennings, Malcom Lowell, Charles Parks, Finally, at the election tally the Board agent did not count two ballots of voters because they were marked on the sample ballot. The parties stipulated that because the intention of these two voters was clear their ballots should be counted.

II. The Challenges

A. Alleged Nonemployees

1. William Henry Clay Walker

Walker's ballot was challenged by the Board agent because his name was not on the voter eligibility list. The Petitioner contends that Walker's ballot should be counted. The University claims that its records show that Walker only taught one class during the eligibility period instead of the two classes required by the election agreement.

At the time of the hearing Walker no longer worked for the University. The parties agree that Walker taught a class in the spring semester 2004. However, Walker also taught a course titled Sports Issues for spring semester 2003. That came about because the professor who had taught that course for a number of years was taking maternity leave and sought a replacement while she was away. The professor's first choice to teach the course was unable to do so, so at the last minute Walker agreed to teach it. However, because of the last minute nature of this

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[1] At the hearing Petitioner stipulated that Sage's ballot *not* be counted. However, in its brief to me Petitioner lists Sage as someone whose ballot *should* be counted. Petitioner does not make a motion to withdraw from the stipulation or otherwise explain this inconsistency. In response, the University sent a letter to me pointing out this discrepancy and Petitioner's stipulation at the hearing. The Petitioner received the University's letter but did not respond. I conclude the Petitioner's post hearing brief is in error on this matter.

[2] At the hearing Petitioner stipulated that Boswell's ballot *should* be counted. However, in its brief to me Petitioner lists Boswell as someone whose ballot *should not* be counted. As described above in the previous footnote Petitioner does not make a motion to withdraw from this stipulation or otherwise explain this inconsistency. As indicated in the previous footnote the University sent a letter to me pointing out this discrepancy and Petitioner's stipulation at the hearing. The Petitioner received the University's letter but did not respond. I conclude the Petitioner's post hearing brief is in error on this matter also.

matter there was not time for the paper work to be processed to allow the University to pay Walker directly. Instead, the professor who was on maternity leave paid Walker the amount he would have earned had he been paid directly by the University. Although Walker did not receive an appointment letter, the University approved of the arrangement made by the Walker and the professor. Other than differences related to the source of payment, Walker was treated by the University in the same way it treated other part-time professors.[3]

Analysis

As indicated, the University contends that Walker's ballot should not be counted because he was not employed by the University for the spring semester 2003. Instead, the University argues, he was employed by the professor who was out temporarily on maternity leave. I reject that argument. The University knew of and approved the last minute arrangements that allowed Walker to teach that semester. It treated Walker as if he was its employee by requiring that he submit grades for the students, allowing him to use its facilities and equipment, etc. Looking at the totality of circumstances, I conclude Walker was employed by the University for the springsemester 2003 and therefore was an eligible voter whose ballot should be counted.

2. Katherine Garrett and Amy Wind

The ballots of Garrett and Wind were challenged by the Board Agent because their names were not on the eligibility list. The University contends that Garrett and Wind were not employees of the University but were instead independent contractors or employees of another business. Petitioner contends their votes should be counted.

Garrett and Wind are principals in Wind & Garrett, PLLC, a two-person mediation consulting firm. They were both appointed by the University to co-teach courses in the 2003 and 2004 spring semesters. After the first semester they deposited the checks they received from the University into their business account. Their accountant advised them that this was resulting in double taxation, once as individuals and again as a business. So they made arrangements with the University to deposit the checks directly into the business account. On January 22, 2004, the University sent Wind & Garrett a letter describing the arrangement. The letter stated, among other things:

> The George Washington University will pay the sum of $(amount omitted) at the conclusion of the semester for the services of Amy Wind and Katherine Garrett. Payment will be made by the George Washington University based on an invoice submitted by you in the amount of $(amount omitted). The invoice, including your taxpayer I.D.#, should be submitted … .

Garrett also signed documents indicating that no employee of the University had an interest in, or received a gratuity or benefits from, Wind & Garrett and that Wind & Garrett did not employ any current employee of the University. At the hearing Garrett explained that she felt that Wind &

[3] These facts are based on Walker's credible and undisputed testimony.

Garrett had no employees; she and Wind were the two principals of the business. Nothing changed concerning the manner and means by which Wind and Garrett taught the classes.[4]

Analysis

In determining whether individuals are independent contractors and therefore not employees the Board applies the multifactor common-law test of agency. *NLRB v. United Insurance Co.*, 390 U.S. 254 (1968); *Dial-a-Mattress Operating Corp*., 326 NLRB 884 (1998); *Roadway Package System*, 326 NLRB 824 (1998). Although Wind and Garrett signed papers indicating that they were independent contractors and not employees of the University and their pay and taxes were treated in that manner, in all other respect they continued to be employees of the University just like other admitted eligible voters.

While the University argues that Wind and Garrett were no longer employees of the University, it concedes that Wind & Garrett was not free to send whomever it wanted to teach the courses; the University expected that the teachers would be Garrett and Wind. As the Petitioner points out in brief, the Board has held that a written agreement indicating that individuals are "independent contractors" is not determinative of their status. *Big East Conference*, 282 NLRB 335, 345 (1986). Nor is the fact that the University discontinued deductions of payrolls taxes determinative. *Miller Road Dairy*, 135 NLRB 217, 220 (1962). I conclude that Wind and Garrett are employees and their ballots should be counted.

B. Alleged Administrators

The Petitioner contends that a number of voters are ineligible because they are administrators. The stipulated unit, described above, specifically excludes "all administrators." The University, however, contends that these same challenged voters also work as part-time faculty members and are otherwise eligible to vote. The University argues that none of these challenged voters possesses supervisory or managerial authority and so their ballots should be counted.

I begin my analysis of this issue by recognizing that the parties here should be held to their agreed-upon unit so long as that agreement is clear and is consistent with Board law and policy. *Ansted Center*, 326 NLRB 1208 (1998). In this case the parties agreed to include part-time faculty on the one hand, but exclude administrators on the other. The Petitioner argues that the unit description clearly indicates that all administrators should be excluded, but I disagree. The stipulated unit does not resolve the issue presented here of whether employees are eligible if they are both part-time faculty and administrators. Where the stipulated unit description does not clearly resolve the issue of voter eligibility the Board will apply its traditional community-of-interest standard to decide the issue. *Lear Sigler*, 287 NLRB 372 (1987). I conclude that the application of the traditional dual function employee test is needed to resolve this issue. *Berea*

[4] These facts are based on Garrett's testimony and documentary evidence, which I conclude is credible. I have considered the testimony of Associate Dean Jeffery Guttman but I conclude that it is largely opinion testimony and not based on first hand knowledge of the facts surrounding these events.

Publishing Co., 140 NLRB 516, 518–519 (1963); *Harold J. Becker Co.*, 343 NLRB No. 11 (2004); *Oxford Chemicals*, 286 NLRB 187 (1987).

The Petitioner argues in the alternative that if the unit description is ambiguous then the challenged voters should be excluded because they are so allied with management as to establish a differentiation between them and other employees in the unit, citing *Rite Aid Corp.*, 325 NLRB 717, 719 (1998), *Detroit College of Business*, 296 NLRB 318 (1989), and *Adelphi University*, 195 NLRB 639, 644 (1972). The University agrees that administrators who are supervisors or managerial employees should be excluded from the unit. I agree, of course, that managerial employees and supervisors should be excluded from the unit. The burden of establishing supervisory and agency status rests on the party making those assertions, in this the Petitioner. *Kentucky River Community Care*, 532 U.S. 706 (2001). Applying these principles I now turn to the challenged voters to determine whether they are dual function employees who should be included in the unit or whether they are supervisors or managers who should be excluded. In resolving supervisory issues I am guided by *Kentucky River Community Care*, supra. As will be seen below, it is necessary to point out that the exercise of otherwise supervisory authority in a merely routine, clerical, perfunctory, or sporadic manner does not confer supervisory status. *J. C. Brock Corp.*, 314 NLRB 157, 158 (1994). In determining managerial issues I am guided by *NLRB v. Yeshiva University*, 444 U.S. 672 (1981). Finally, I note that these challenged voters all have impressive job titles. However, it is well settled that titles are not determinative of supervisory or managerial status. *West Broadcasters-KTLA*, 215 NLRB 760 (1974).

1. Vittal Anantatmula

Vittal Anantatmula is acting program manager for project management in the school of business. About 290 students participate in that program. As acting program manager Anantatmula serves as an administrator for that program; he reviews student applications for the program and advises the students. If the students are not meeting the academic requirements of the program Anantatmula sees to it that they are placed on probation. Three staff members report to Anantatmula and assist him in administering the program. Anantatmula interviewed them and recommended their hire to the department chair who has final approval. Anantatmula also is a part-time faculty member. He taught courses in management science in the spring and fall semesters 2003.

Analysis

I conclude that the Petitioner has failed to meet its burden of showing that Anantatmula is either a managerial employee or supervisor. In placing students on probation Anantatmula follows established guidelines and there is no evidence that he can deviate from them. While the evidence shows that he has recommended staff members for hire, the evidence is insufficient for me to conclude that those recommendations are effective. Accordingly, I shall overrule the challenge to his ballot and direct that it should be counted.

2. Keith Betts

Betts is senior executive director of student and academic support services; as such he works on special projects and new initiatives. For example, Betts was asked to look into wellness on campus so he did an assessment of the fitness and wellness of students on campus.

Betts is considered an administrator, but he possesses no supervisory or managerial authority. Betts also is a part-time faculty member. In both the spring and fall semesters 2003 he taught a course in exercise science.

Analysis

Because the Petitioner has failed to establish that Betts possesses managerial or supervisory authority I shall overrule the challenge to his ballot and direct that it be counted.

3. Celeste Campbell

Campbell works as a research scientist in the department of teacher preparation and special education in the graduate school of education and human development. She worked in this position part-time beginning August 13, 2003; as of October 1, 2004, she began working full-time in this position. Campbell teaches two online courses in her position as research scientist for students who are not in the local area. These courses are part of a program developed pursuant to a grant from the Department of Education. Campbell also works as a part-time faculty member. For the fall semester 2003 and the spring semester 2004 she was appointed as assistant professorial lecturer in Special Education and taught for-credit courses.

Analysis

Petitioner argues that Campbell is a manager because she helps develop the curricula for the courses that she teaches. But I conclude that this is insufficient to make Campbell a managerial employee. I shall overrule the challenge to her ballot and direct that it be counted.

4. Joseph Hall

For part of the eligibility period for the election Hall was associate vice president for development. In that position he oversaw all activity relating to fundraising and alumni relations. He interacted with alumni for fundraising purposes. A number of directors of development for the various schools at the University reported to him. By July 14, 2004, Hall was appointed to serve as interim vice president for development while the University searched for a permanent person to fill that position. In that position he had final approval of all hiring and firing that took place in that division. On September 10, 2004, he left that position to work for a private enterprise.

Hall also has worked for the University for 8 years as an adjunct faculty member of the Graduate School of Political Management. More specifically Hall taught courses in that part-time faculty position for the spring and fall semesters 2003 and the spring semester 2004. Hall did not teach a course in the fall semester 2004 but he was expected to teach in the spring semester 2005. Due to the pressures of his new position outside the University he asked his superiors if he could teach that course during the fall s32emester 2005. His superiors agreed and Hall expects to continue to teach in the part-time position in the future.

Analysis

Hall quit his full-time position with the University before the election period of October 4–19. Thus, at the time of the election he was employed only as a part-time faculty member with the University. I further conclude, based on the fact set forth above, that at the time of the election Hall a reasonable expectancy of continued employment in that position. I shall overrule the challenge to his ballot and direct that it be counted.

5. Loring Ingraham

Ingraham is acting deputy director of the doctor of psychology department. His main responsibility is advising students. He is also a regular part-time faculty member and generally taught five courses per year, including during the spring and fall semesters in 2004 and 2003.[5]

Analysis

Petitioner's entire argument concerning Ingraham is:

> Dr. Ingraham is the acting Deputy Director of the Psy. D Program at the George Washington University (Tr. 328). As acting Deputy Director of the program, Dr. Ingraham apparently teaches more courses than his colleagues (Tr. 337-340). Dr. Ingraham should be excluded as an administrator.

I conclude that this is insufficient to show that Ingraham is either a supervisor or a managerial employee. I overrule the challenge to his ballot and direct that it be counted.

6. David M. Johnson

Johnson is employed by the University as an assistant dean for student affairs for the law school; this is a full-time position but it is not a teaching position. In that capacity Johnson attends to the needs of the law students on a wide range of matters. He has no supervisory or managerial duties. Johnson is also employed as a part-time faculty member and teaches legal writing. He taught courses in the fall semester, 2003 and in the spring semester, 2004. He receives one paycheck but the paycheck has separate line items for each position.

Analysis

[5] The foregoing facts are based on the testimony of Ingraham, who I conclude is a credible witness. I have considered the testimony of Christopher Lornell. Lornell was a volunteer for the Petitioner who sought voter eligibility information concerning the names the University placed on the list of voters. Lornell testified that Ingraham told him that, in consultation with his superior Dr. Holmes, Ingraham "had the responsibility" for budgetary issues, scheduling faculty, and hiring and firing faculty. Based on my observation of the relative demeanor of the witnesses I do not credit Lornell's testimony; Lornell appeared too eager to support the Petitioner's position. Moreover, I conclude that Lornell did not testify concerning the entire conversation that he had with Ingraham on that occasion and so I am unable to assess the context in which Ingrahom's alleged comments were made.

In its brief the Petitioner's argues that Johnson is an administrator. Its complete argument concerning Johnson is:

> Mr. Johnson is the Assistant Dean for Student Affairs in the George Washington University Law School (Tr. 123). As such, he is part of the management team that administers the program of the School, including student affairs programs, and he should be excluded from eligible voters in the representation election.

I conclude that this is insufficient to show that Johnson is either a supervisor or a managerial employee. I overrule the challenge to his ballot and direct that it be counted.

7. Peter Konwerski

Konwerski is assistant to the senior vice president for the division of student and academic support services; he deals primarily with student issues. The University's website identifies Konwerski as an administrator. Konwerski also is a part-time faculty member. He teaches human services classes and he did so in the spring and fall semesters in 2003.

Analysis

Petitioner argues:

> In accordance with his title and his placement on the organizational chart, [Konwerski] is a high ranking administrator, closely aligned with the Employer's interest. He should be excluded from eligibility to vote in the representation election.

However, titles are not determinative of supervisory or managerial status. Because the evidence is insufficient to show that Konwerski is a supervisory or managerial employee I overrule the challenge to his ballot and direct that it be counted.

C. Alleged Full-Time Faculty

1. Joseph Pelton

Petitioner has challenged the ballot of Joseph Pelton on the basis that he is a full-time faculty member. The University disagrees. Pelton is a research professor in the field of transportation and advanced communications. He is a regular part-time faculty member and taught courses in the spring and fall semesters in 2003.

Analysis

There is no credible evidence that Pelton is a full- time faculty member. I overrule the challenge to his ballot and direct that it be counted.

2. Jeannine Williams Skarka

Petitioner challenged the ballot of Jeannine Williams Skarka on the grounds that she is a full-time faculty member. The University disagrees and argues that Skarka's ballot should be counted. Skarka is the assistant director for recreational sports; she runs the fitness and wellness programs for the University. She does this at the Fitness and Wellness Center which has cardio equipment, aerobics studios, basketball courts, and the like. Skarka hires the approximately 10 aerobics instructors using guidelines provided to her. The aerobics instructors are hourly paid and work no more than 3 hours per week. She does not hire the personal trainers who work at the Center. Together with her supervisor they hired the two massage therapists. Skarka also is a part-time faculty member and has taught courses in exercise science for the fall semester 2003 and the spring semester 2004.

Analysis

In its brief, Petitioner's full argument concerning Skarka is:

> Ms. Skarka is the Assistant Director of Recreational Sports (Tr. 405), and as such should be excluded from eligibility for voting in the representation election.

There is no evidence that Skarka is a full-time faculty member There is also no evidence that Skarka has managerial authority and the role she plays in hiring aerobic instructors is insufficient to make her a supervisor or that her interests are so aligned with management as to warrant her exclusion from the unit. I overrule the challenge to her ballot and direct that it be counted.

3. David Nagel

The petitioner challenged the ballot of David Nagel on the grounds that he is a full-time faculty member. The University contends that Nagel is an eligible voter whose ballot should be counted. Nagel works as a research professor in the department of electrical and computer engineering. As such he does studies and writes reports. Grants for these projects came from the Department of Energy and the National Defense University. Sometimes students are hired to also work on these projects; Nagel has interviewed two students and recommended them for hire; he has recommended that one student be fired. On one occasion Nagel interviewed and recommended for hire a research assistant to assist him on a project; this was a full-time position for 5 months. In addition Nagel has taught an electrical and computing engineer course for the spring semesters for the last 5 years.[6]

[6] The foregoing facts are based on the testimony of Nagle, who I conclude is a credible witness. I have again considered the testimony of Christopher Lornell. Lornell testified that Nagle "told me that he was a Research Professor. He said that he could be hired up to full time, although it was not clear what that meant as to being up to full time. When I asked him if he was an Adjunct, I remember vividly him responding by saying, I'm not an Adjunct. I said, do you teach? He said, yes, I teach as a Professor, not as an Adjunct, and he did not seem to know what the term Adjunct meant in this case. I was quite surprised, but that was his response." It was apparent to me that Lornell did not relate the entire conversation that he had with Nagle, and his testimony was interspersed with his subjective impressions. Also considering Lornell's demeanor as a witness, I do not give his testimony much weight.

Analysis

Petitioner makes no argument in its brief concerning why it feels Nagel should be excluded; certainly there is no evidence that he is a full-time faculty member. The evidence set forth above is insufficient to show that Nagel has real supervisory authority or that his interests are so aligned with management as to require his exclusion from the unit. I overrule the challenge to his ballot and direct that it be counted.

4. Marion Clark

Petitioner challenges the ballot of Marion Clark on the basis that he is a full-time faculty member. The University disagrees and contends that her ballot should be counted. Clark is a lecturer in the College of Professional Studies, Landscape Design Program. She is a part-time faculty member; she is not a full-time faculty member. She taught courses relating to landscape design during the spring and fall semesters 2004.

Analysis

Petitioner makes no argument in its brief concerning why it feels Clark should be excluded; there is no evidence that he is a full time faculty member. I overrule the challenge to his ballot and direct that it be counted.

5. Tibor B. Schonfeld

The ballot of Tibor B. Schonfeld was challenged by the Petitioner on the basis that he was a full-time faculty member. The University disagrees and asserts that Schonfeld's ballot should be counted. Schonfeld worked as a full-time research professor of engineering and applied science in the Electrical Computer Engineering Department until January 2003. Schonfeld also works as a private consultant in the field of electrical and computer engineering. On September 25, 2003, after he was no longer a full-time faculty member, Schonfeld was appointed as a part-time faculty as a research professor of engineering and applied sciences; he taught a 10-week course on electrical and computer engineering in the Fall Semester that year. He thereafter taught courses in the spring and fall semesters in 2004.

Analysis

Although at the hearing the Petitioner continued to assert a challenge to Schonfeld's ballot, in its posthearing brief to me it does indicate specifically the basis for the challenge or the evidence it relies on. Because the facts show that Schonfeld was not employed as a full-time faculty member during the eligibility period but was employed as a part-time faculty member instead, I overrule the challenge to his ballot and direct that it be counted.

Conclusion

I conclude that the challenges to the following ballots should be sustained and the votes not counted: Patricia Wrightson, Hollie Weisman, Alice M. Stevens, Christina Sevilla, Abby Weiner, Cheryl Focht, Kelly Mulligan, Allison Purpura, Morris Parker, Linda Raphael, Christina Hanson, Bernard Cabral, Sandra Alboum, Warren Allen, Michael Everitt, William Jackson,

Renee Spriggs, Peter Sage, Megan Davis, Dorothy Holmes, Adele Ashkar, Kimberly Digges, David Michaels, and Nina Michalevsky.

I also conclude that the challenges to the following ballots should be overruled and their ballots counted: Deborah Sobeloff, Carol Rochester, Elaine Murphy, Gwen Roberts, Brian Flota, Sara Davis, Sharon Confesiore, John Boswell, Pamela Jennings, Malcom Lowell, Charles Parks, William Henry Clay Walker, Katherine Garrett, Amy Wind, Vittal Anantatmula, Keith Betts, Celeste Campbell, Joseph Hall, Loring Ingraham, David M. Johnson, Peter Konwerski, Joseph Pelton, Jeannine Williams Skarka, David Nagel, Marion Clark, and Tibor B. Schonfeld.

At the election count the Board agent did not count two ballots of voters because they were marked on the sample ballot. The parties stipulated that because the intention of these two voters was clear their ballots too should be counted. [7]

Dated, Washington, D.C., March 2005.

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William G. Kocol
Administrative Law Judge

[7] Under the provisions of Sec. 102.69 of the Board's Rules and Regulations exceptions to this report with the Board in Washington, D.C. by [date].